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IN THE UTAH SUPREME COURT

BOARD OF EDUCATION OF THE JORDAN SCHOOL DISTRICT Appellant, vs. SANDY CITY CORPORATION Appellee.	**BRIEF OF AMICUS CURIAE UTAH SCHOOL BOARDS ASSOCIATION** Supreme Court No. 20020020-SC

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, HONORABLE ROGER A. LIVINGSTON, DISTRICT JUDGE

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CONSENT FOR AMICUS FILING

Appellant Board of Education of the Jordan School District ("Jordan School District") and Appellee Sandy City Corporation ("Sandy City" or "City") have previously consented to the appearance of the Utah School Boards Association as *amicus curiae* as required by Rule 25 of the Utah Rules of Appellate Procedure. A Stipulation Consenting to the Filing of Amicus Briefs by parties in support of the Jordan School District was previously filed with the Supreme Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction for appellate review pursuant to Utah Code Annotated § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR APPEAL

The Utah School Boards Association hereby adopts and incorporates the Statement of Issues Presented for Appeal set forth in the Brief of Appellant Jordan School District. In addition, the Utah School Boards Association believes that in ruling on this appeal the Court can and should consider the practical effect of the storm drain charges, whether those charges are characterized as fees or assessments or otherwise, to determine if the charges are in reality an improper tax of one governmental entity upon another.

CONTROLLING STATUTES, ORDINANCES AND RULES

Section 10-9-106, Utah Code Annotated, provides in relevant part:

(2) A school district is subject to a municipality's land use

regulations under this chapter, except that a municipality may not:

* * *

(c) require a district to pay fees not authorized by this section;

Utah Code Ann. § 17A-3-315 provides in relevant part:

> . . . [A] municipality may not levy an assessment against property owned by the federal government, the state of Utah, any county, school district, municipality or other political subdivision of the state of Utah or by any department or division of any such public agency even though such property is benefited by improvements made, but each such public agency is authorized to contract with the municipality for the making of such improvement and for the payment of the cost thereof to the municipality. Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including, by way of example and not in limitation, charges for water, lighting, or sewer services.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Jordan School District has challenged the authority of Appellee, Sandy City Corporation ("Sandy City" or "City"), a municipality located within Salt Lake County, to assess a monthly "storm sewer drainage fee" (the "storm drain charge") to pay for the costs of operating, improving and maintaining the storm sewer drain system of Sandy City.

This appeal arises directly from the Order of the Third Judicial District Court in and for Salt Lake County by Judge Roger A. Livingston, granting Partial Summary Judgment to Sandy City and an Order entered 1 November 2001 Dismissing Remaining

Claims or Theories Without Prejudice signed by Judge Livingston on 17 December 2001 and filed with the lower court on 18 December 2001.

B. Nature of Utah School Boards Association's Interest in this Appeal

The Utah School Boards Association ("the Association") is established pursuant to authority of Utah Code Annotated § 53A-5-2 and operates as an agent and representative of 40 school districts throughout the state. Each of these school districts operates schools which are located in municipalities and therefore may be subjected to storm drain ordinances similar to the ordinance at issue in the instant case. The Utah School Boards Association as *amicus curiae* will attempt to represent to the Court the perspective and interests of the range of school districts that are members of the association. The Association's primary concern is that the charges made pursuant to the storm drain ordinance in question here, however those charges may be labeled or characterized, are in actual effect a tax being imposed by one governmental entity upon another. The Association therefore desires that the Court provide guidance regarding the permissible scope of charges for services as opposed to monetary exactions for other purposes.

C. Statement of Facts

The Utah School Boards Association adopts the statement set forth in the "Statement of Facts" of the Brief of Appellant Jordan School District.

SUMMARY OF ARGUMENT

The storm drain charge imposed by Sandy City is prohibited by Utah Code Ann. §

10-9-106 because it directly affects the management and development of land by impacting issues concerning both facility construction and landscaping design.

In addition, and more importantly, the storm drain charge is in actuality a tax which is being imposed by one governmental entity, the City, upon another, the Jordan School District. Whether or not the technicalities of terminology apply, the practical effect of the storm drain charge is to compel Jordan School District to contribute its taxpayer-derived funds to the City's project to develop new and expanded storm drain facilities. The charges are in effect the same as an assessment on school property which is prohibited by § 17A-3-315. Sandy City should be barred from compelling this redistribution of taxpayer funds from Jordan School District to itself notwithstanding its effort to evade limitations on intergovernmental taxation by the terminology it uses in its storm drain ordinance. Ruling otherwise would open the door to municipalities effectively taxing school districts throughout the state for any capital improvement project which can be tied to an activity which also ostensibly involves a service when taxation is specifically prohibited by statute.

In addition, the amount of the charges at issue raises serious questions regarding the reasonableness of those charges, and the Association believes that a full disposition of the validity of the charges should also involve an appropriately supported examination of the reasonableness of the charges. In the event that the Court sustains the ordinance in question, the Association recommends that the Court remand for further factual proceedings regarding the reasonableness of the charges.

ARGUMENT

Utah Code Ann. §10-9-106 and Utah Code Ann. § 17A-3-315, among other statutes, implement the general prohibition and policy against the redistribution of public funds from one tax-supported entity to another absent the specific authority of limited exceptions. The structure and effect of the Sandy City ordinance indicates that the City in this ordinance has attempted to sidestep this prohibition and essentially tax Jordan School District under the guise of charging "for services." By characterizing the assessments as charges for services, the City is doing "indirectly what it cannot do directly." *State ex rel. Board of Education of Salt Lake City v. McGonagle*, 11 P. 401, 402 (Utah 1910). The storm drain charge is in reality an assessment prohibited by Utah Code Ann. § 17A-3-315 rather than a permissible charge for services under that statute. The District Court's sustaining of the ordinance was therefore in error and its decision should be reversed.

I. THE STORM DRAINAGE UTILITY FEE IS PROHIBITED AS AN UNAUTHORIZED FEE BY UTAH CODE ANN. § 10-9-106(2)(C).

The Municipal Land Use Development and Management Act, Utah Code Ann. § 10-9-106(2)(c), prohibits the collection of Sandy City's storm drain charge because those charges effectively constitute a fee imposed based on school district decisions on how to use its land. Section 10-9-106(2)(c) provides in part:

> A school district is subject to a municipality's land use regulations under this chapter, except that a municipality may not: . . . require a district to pay fees not authorized in this section.

Significantly, section 10-9-106(2)(a) prohibits a municipality from "impos[ing]

requirements for landscaping, fencing, aesthetic considerations, construction methods or materials, building codes, building use for educational purposes, or the placement or use of temporary classroom facilities on school property." The utility fee being charged by Sandy City directly affects and is directly based upon school property use, and therefore effectively imposes requirements regarding landscaping, construction methods, and the placement of school facilities. Because the charges are based on property area and area of impervious surface, the charges directly impact Jordan School District's land use decisions concerning various matters including facility construction (for example, whether to build schools with multiple stories to reduce the building "footprint" and thereby the impervious surface area) and landscaping design questions such as whether play areas are grass or asphalt, and whether to include rainwater catch basins separately or to design play areas and athletic fields also to serve this purpose.

Furthermore, aside from the specific considerations mentioned in section 10-9-106(2)(a), section 10-9-106(2)(c) has been violated because of the simple fact that Sandy City seeks to charge Jordan School District based on the manner in which it is using its land. That is a fee in connection with land use and is prohibited by this statute, and interferes with Jordan School District in fulfilling its duty to provide its students, teachers and other school occupants with "safety, health, and comfort." *See* Utah Code Ann. § 53A-20-103(1)(b).

Sandy City argues that section 10-9-106 does not apply because the City is merely imposing a fee for services rendered, which is expressly permitted by Utah Code Ann. §

17A-3-315, and therefore this more specific statute regarding charges for services or materials actually rendered or supplied should govern. The City urges this Court to "limit the applicability of §10-9-106(2)(c) to fees under the Municipal Land Use and Development Act." (Brief of Sandy City p. 10.) This narrow view of section 10-9-106 ignores the real impact on land use which the ordinance in question has and also ignores significant differences between the storm water drainage charge and charges for utility services supplying electricity or water or taking and disposing sewage produced by an entity. Unlike those utility services, the storm water charges are not based on the actual amount of power or water provided or the actual amount of sewage treated, or even on the actual amount of pollution which is added by Jordan School District's properties, but are instead based upon the manner in which the district is using its property. Therefore, the land-use provisions included in section 10-9-106 are in fact more specific to this case than the portions of section 17A-3-315 relating to charges for services, and the taxing prohibition in the land use statute should control.

II. THE STORM DRAINAGE UTILITY FEE IS PROHIBITED AS AN UNLAWFUL ASSESSMENT AGAINST JORDAN SCHOOL DISTRICT IN VIOLATION OF UTAH CODE ANN. § 17A-3-315.

Apart from the land-use considerations, the Sandy City ordinance cannot be applied to Jordan School District because it establishes an assessment prohibited by Utah Code Ann. § 17A-3-315. Under the plain language of the Sandy City storm drain ordinance, the great majority of the charges made in connection for the storm drain are **not** for the services of operating and maintaining of the system but rather are for **capital**

improvements. The ordinance provides for a "service fee credit" which can be obtained by non-residential parcels by instituting on-site mitigation measures. *See* Sandy City Municipal Code § 17-2-6(c)(4), R. 46-47. This credit is calculated using a formula which indicates that 70% of the total storm drain charges represent costs for the storm drain utility's "capital improvement program." *See id.* The remaining 30% represent the utility's "fixed operation and maintenance costs," or the actual handling of water and upkeep of the system.[1] Thus, the storm drain fee is imposed primarily to fund the construction of new facilities for handling storm water, and not for services of handling that storm water.

Utah Code Ann. § 17A-3-315 provides in relevant part [2]:

> . . . [A] municipality may not levy an assessment against property owned by the federal government, the state of Utah, any county, school district, municipality or other political subdivision of the state of Utah or by any department or division of any such public agency even though such property is benefitted by improvements made, but each such public agency is authorized to contract with the municipality for the making of such improvement and for the payment of the cost thereof to the municipality. Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including,

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[1]It is significant to note that the structure of the formula is such that even if the non-residential property has on-site retention facilities such that there will be **no** runoff from the property, the property will still be charged 30% of the regular storm drain fee: In other words, the property will be charged for services even when no services are actually being provided.

[2]The remainder of the statute permits assessments in the narrow factual context where the public entity acquires property after that property was already subject to an assessment. *See* Utah Code Ann. § 17A-3-315(2). That provision is not relevant or material to this case.

by way of example and not in limitation, charges for water, lighting, or sewer services.

Utah Code Ann. § 17A-3-315(1) (emphasis added).

Despite the City's labeling the storm drain fee a "charge for services," the fee in reality and in its effect constitutes an assessment and is therefore prohibited under section 17A-3-315. The fee should be considered an assessment because it is (1) imposed on property for the purpose of building capital improvements benefitting the property, and (2) it is involuntarily imposed on a general basis. Furthermore, Sandy City's exemption of state and county property constitutes a tacit acknowledgment that the fee constitutes an assessment or tax.

A) Assessments exist when the funds are used to pay "all or a portion of the costs of making improvements"

An assessment is defined as "a special tax levied against property within a special improvement district to pay all or a portion of the costs of making improvements in the district." § 17A-3-303(1) (emphasis added). In describing assessments for purposes of a statute exempting school districts from assessments, the Utah Supreme Court stated that an assessment "is levied under the taxing power and is imposed on property within a limited area for an improvement to enhance all property within that area." *Murray City v. Board of Ed. of Murray City School District*, 396 P.2d 628, 630 (Utah 1964). "On the other hand, the cost of a service is determined by the benefits conferred upon the occupants of the land rather than increase in value to the land itself." *Id.* In upholding the monthly sewer charge at issue in *Murray City*, the Court observed that the city had

the authority to "impose charges for sewer treatment and disposal as a sewer district." *Id.* at 632. Significantly, however, the Court also distinguished between improvements such as paving a street **or laying sewer pipe** as proper bases for assessment, whereas transitory benefits such as providing water to the property or removing and treating sewage were not properly benefits to the land (and thus resulted in charges for services). *See id.* at 631.

Thus, an assessment is a charge for permanent, capital improvements which are of a benefit to an area of land rather than a charge for ongoing services being provided to the occupants of the land. The storm drain charges are in essence charges made based on property use, for the purpose of building capital improvements to benefit property by handing run-off from impervious surfaces. Therefore, the charges are in spirit and effect, if not in name, assessments which are prohibited. The City's own ordinance expressly acknowledges that the charges are primarily made for purposes of capital improvements to the storm drain system rather than for actual services being provided over a period of time. Unlike the charges in the *Murray City* case, these charges are not primarily for operation and maintenance of the improvement. As a charge for capital improvements to benefit land, the storm drain charges are assessments and therefore, pursuant to section 17A-3-315, cannot be assessed to Jordan School District.

In considering a challenge raised by Granite School District to a one-time charge impact fee to be applied to similar storm-drain purposes, this Court in *Salt Lake County v. Board of Education of the Granite School District*, 808 P.2d 1056 (Utah 1991),

observed, "We agree with Granite that its exemption from payment of local assessments should not be denied it by the simple expedient of calling a local assessment by another name." In that opinion, which considered an impact fee, the Court felt bound by the Legislature's enactments expressly authorizing impact fees to be charged to school districts in appropriate circumstances. The Association acknowledges that properly supported impact fees, which are in the nature of one-time charges imposed as a pre-condition to new building development, may be validly imposed against school districts in appropriate circumstances. However, the ordinance in question is not based on new development. The Legislature has not expressed any policy that municipalities may charge school districts with assessments for capital improvements by characterizing such charges as for "services."

B) Assessments exist when fees are involuntarily and imposed upon benefitting property owners

The storm drain fees are also an assessment because they are imposed involuntarily on landowners whose property is claimed to directly or indirectly benefit from the improvement. In *Pappas v. Richfield City,* 962 P.2d 63, 66 (Utah 1998), this Court considered the definition of the term "assessment" and explained:

> The term "assessment" is a term of art and is expressly defined in the Utah Municipal Improvement Act as "*a special tax levied against property* within a special improvement district to pay all or a portion of the costs of making improvements in the district." Utah Code Ann. § 17A-3-303(1)(a) (emphasis added). This definition makes clear that an assessment is a tax, and it is commonly understood that the "[e]ssential characteristics of a tax are that it is not a *voluntary payment or donation*, but an enforced contribution, exacted pursuant to legislative authority." (citation omitted).

Id. (emphasis in original). In *Pappas*, the school district was exempt from assessment and would have had no obligation to pay the assessment but for the district's voluntary (contractual) agreement to do so. *See id.* at 64, 66. Here, Jordan School District has not voluntarily undertaken to pay the storm drain fees, which the City seeks to impose on the district. The District is by ordinance compelled to pay, even if it retains all storm water on its property. These involuntary charges for capital improvements are properly considered assessments, and Jordan School District should be exempt.

The charges are also imposed only on properties which are claimed to benefit directly or indirectly from the storm drain system. Utah Code Ann. § 17A-3-316(1) provides:

> Assessments shall be levied on all blocks, lots, parts of blocks and lots, tracts, or parcels of property bounding, abutting upon, or adjacent to, the improvements or that may be affected or specially benefited by the improvements to the extent of the benefits to the property by reason of the improvements. These benefits may be indirect and need not actually increase the fair market value of the property.

The claimed need for the storm drain improvements is the increased run-off caused by impervious surfaces on improved property. As stated in the ordinance, the storm drain charges are "impose[d] . . . on each parcel of real property." Sandy City Municipal Code § 17-2-6(a), R. 45. The ordinance expressly characterizes the charges as being "**assessed** on each parcel of real property." Sandy City Municipal Code § 17-2-6(c), R. 46 (emphasis added). The charge is imposed only on those properties which are improved; thus, only properties claimed to be specially benefitted by the capital improvements are charged. This further demonstrates the nature of the charges as an

assessment which Utah law plainly prohibits the City from imposing on school districts.

C) Sandy City's exemption of certain properties is a tacit admission that the charges constitute an assessment.

Apart from the ordinance language referring to the charges as assessments against real property, there are other indications in the ordinance that the charges are in the nature of impermissible assessments. By exempting certain governmental property owners, the storm drain ordinance tacitly admits that the storm drain charges are in fact an invalid assessment. The ordinance provides:

> The City will by resolution of the City Council impose storm sewer drainage fee rates and charges on each parcel of real property within the City **except** governmentally-owned streets and storm water facilities operated and maintained by, or for, the County or the State of Utah.

Sandy City Municipal Code § 17-2-6(c)(4), R. 46-47 (emphasis added). It seems obvious that when writing the ordinance, the Sandy City Council recognized that it could only assess property not owned or operated by a public agency.[3] The storm drain charges have been justified by the City and amicus Orem City on the ground that the City is providing services in treating polluted runoff water. However, that rationalization is contradicted by the storm water ordinance's exemption of public streets from its scope: logic suggests that streets, which would be a major (if not the primary) source of pollution in run-off require more of these services than most other property, yet that property is not being charged for those services. The apparent justification for the

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[3]While the ordinance does seem to suggest that Sandy City property is also to be assessed, this would likely be a matter of bookkeeping rather than actual payments, given that it is the City which is collecting the charges.

differential treatment is that the streets are governmentally owned, which is consistent with the prohibition in Utah Code Ann. § 17A-3-315 against assessing property of other governmental entities. *See* Utah Code Ann. § 17A-3-315(1) ("municipality may not levy an assessment against property owned by the federal government, the state of Utah, any county, school district, municipality or other political subdivision of the state of Utah"). Because that prohibition includes school districts along with the State and county, the exemption for governmentally owned streets should also be applied to other governmentally owned property such as school district property. That raises the significant question of whether property of other governmental entities including the State of Utah and Salt Lake County (courthouses, DMV facilities, administrative offices, and so forth) are in fact being assessed the storm water fees on the same basis as Jordan School District.

The exception for governmentally owned streets is inconsistent with the theory that a service is being provided, but it is consistent with the understanding that the storm drain charges are in fact an assessment which may not be imposed on the property of other governmental entities. An assessment which may not be imposed against other governmental entities also may not be imposed against Jordan School District.

As outlined above, there are several notable ways in which the storm drainage charges partake of the nature of an assessment which is prohibited by state statute. However, whether or not the storm drain charges operate exactly like an "assessment" in the technical sense of the term, in that they become a lien against the property of Jordan

School District, it is apparent that the real effect is that of an assessment-like tax. This is a monetary exaction imposed based on property ownership, on the grounds that the exaction is appropriate because the property is to be benefitted by a public improvement which has not been put into place. It is plainly not a charge for services of treating run-off water and operating and maintaining an existing system, because even entities which retain all of their run-off (thereby not making any use of the supposed services) are nevertheless charged under the ordinance.

III. IF THE STORM DRAINAGE UTILITY CHARGES ARE NOT BEING MADE TO OTHER GOVERNMENTAL ENTITIES, THEN THE CHARGES MAY BE INVALID REGARDLESS OF WHETHER THEY ARE A PROHIBITED ASSESSMENT.

The record does not disclose whether the storm drain charges are made against other property of other governmental entities within Sandy City apart from the governmentally owned streets and water treatment facilities. If such charges are not imposed, then there are serious questions regarding the validity of the charges being imposed on Jordan School District. It would appear to be arbitrary and capricious or an abuse of discretion for Sandy City to choose to charge the property of some governmental entities while not charging property of other governmental entities. Any services provided to Jordan School District by virtue of the district owning developed property are identical to the services provided to other governmental entities which also own governmental property. The express exemption for certain governmental property raises the question of whether other governmental property not expressly exempted is being assessed the storm drain charges. It would therefore be appropriate to remand to

determine whether in fact the storm drain charges are uniformly applied to property of all governmental entities.

IV. EVEN IF THIS COURT DETERMINES THAT THE STORM DRAIN CHARGES ARE PERMISSIBLE "CHARGES FOR SERVICES," THERE IS SERIOUS QUESTION WHETHER THE CHARGES ARE REASONABLE.

Even assuming that this Court were to determine that the storm drain charges are actually charges for services rather than assessments for capital improvements, this amicus believes that serious questions about the reasonableness of the charges warrants remanding this matter for further proceedings. Sandy City in its brief cites and relies on that portion of Utah Code Ann. § 17A-3-315 which provides:

> . . . Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including, by way of example and not in limitation, charges for water, lighting, or sewer service.

Assuming, *arguendo*, that the utility fee imposed is a charge for services which would normally be permitted under § 17A-3-315, there are serious questions whether the charges are reasonable fees based on services or materials actually provided. While there is little information in the record regarding the total amount of revenue generated by Sandy City's storm drain fees, the little information that there is suggests that it is highly disproportionate to the actual services being provided. The record does contain a bill for Jordan High School for one month. (R. 7.) The portion of that bill related to storm drain charges is $828.54. That translates to approximately $10,000 per year from one school. In addition to this high school, the Jordan School District operates several middle schools

and numerous elementary schools within the boundaries of Sandy City. (Record 16-18.) The Orem City amicus brief indicates that school district property in Orem accounts for about 5% of all of the property which it subjects to storm drain charges. If Jordan School District property forms a similar proportion of the Sandy City charged property, the total amount of revenue is likely quite large. This large amount of money, in conjunction with the Sandy City ordinance's explicit acknowledgment that 70% of the fees are **not** applied to maintenance and operation, strongly suggests that the charges are not a reasonable charge for services. Given that the record is not adequate to fully address this issue, in the event that this Court sustains the decision below regarding the general question of whether the charges may be imposed, it would be appropriate to remand for further proceedings regarding reasonableness of the charges.

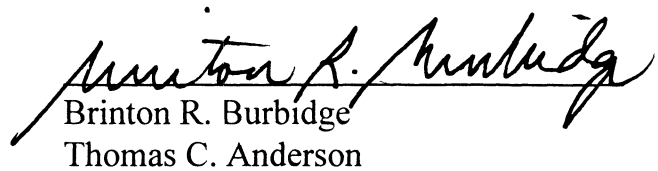
CONCLUSION

For the foregoing reasons, the Utah School Boards Association respectfully urges this Court to reverse the decision of the trial court and to provide guidance that municipalities may not tax school district property for public improvements merely by characterizing those taxes as charges for services. Should the Court sustain the ordinance in question with regard to the general authority of the City to impose a storm

drain fee, the Association asks that the Court remand for further proceedings regarding the reasonableness of the charges imposed.

RESPECTFULLY SUBMITTED this 8TH day of October, 2002.

BURBIDGE & WHITE, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 8TH day of October, 2002, I caused to be served by U.S. mail, postage prepaid, a true and correct copy of the attached and foregoing **BRIEF OF AMICUS CURIAE UTAH SCHOOL BOARDS ASSOCIATION** to the following:

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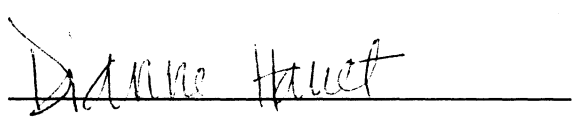

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